

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MITCHEL FREEMAN,	)	
	)	
Claimant,	)	<b>IC 05-005376</b>
	)	<b>IC 05-007169</b>
v.	)	
	)	
KEVIN GIBSON,	)	
and MELTON HOMES, INC.,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND RECOMMENDATION</b>
Employers,	)	
and	)	
	)	<b>FILE JULY 27 2006</b>
IDAHO STATE INSURANCE FUND,	)	
	)	
Surety,	)	
Defendants.	)	
	)	

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**INTRODUCTION**

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Coeur d'Alene, Idaho, on April 11, 2006. Richard P. Wallace represented Claimant. Kevin Gibson (hereinafter "Gibson") failed to appear. Bradley J. Stoddard represented Melton Homes, Inc., and Surety (hereinafter collectively "Defendants," excluding Gibson). Claimant and Defendants submitted briefs and the case came under advisement on June 13, 2006. It is now ready for decision.

**ISSUES**

After due notice the issues are as follows:

1. Whether the Claimant was an employee of Kevin Gibson at the time of the industrial accident on or about April 21, 2005;
2. Whether Melton Homes, Inc., was Claimant's statutory employer at the time of the industrial accident on or about April 21, 2005;
3. Whether and to what extent Claimant is entitled to the following benefits:

- (a) permanent partial impairment (PPI);
- (b) disability in excess of impairment; and
- (c) medical care.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that when he was injured in an accident at work he was employed by uninsured employer Gibson. Defendants are liable as a general contractor and statutory employer. Claimant is entitled to payment of medical bills arising from his broken right foot.

Defendants contend Claimant was not an employee of Gibson but an independent contractor. Defendants were not a general contractor on the job and have no liability regardless of Claimant's relationship to Gibson.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, Kenneth "Buck" Melton, and Claimant's wife;
2. Claimant's exhibits A-C; and
3. Defendants' exhibit A.

### **FINDINGS OF FACT**

1. Claimant worked as a drywaller. He had two years' experience in the industry and was not a journeyman drywaller. He had previously worked as a co-employee with Mr. Gibson for one employer. On April 21, 2005, and during the week prior, Claimant believed he was working as an employee of Gibson, d/b/a Custom Cuts. On that date a plank on a scaffold broke. Claimant fell about nine feet and broke his right foot.

2. Gibson was on site at the time of the accident. He informed Claimant he did not have workers' compensation insurance and instructed Claimant to say he worked for Melton Homes, Inc., when he got to the hospital.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

3. Mike Horton, a commercial fisherman, was building a new residence. The accident occurred on Mr. Horton's property where his new residence was being constructed.

4. Buck Melton is president of Melton Homes, Inc., a general contractor. Mr. Horton and Mr. Melton had been neighbors elsewhere previously. Mr. Horton purchased a piece of property, subdivided it and sold half to Mr. Melton. Mr. Melton and Mr. Horton planned to remain neighbors at this new location. Melton Homes, Inc., owned the scaffold from which Claimant fell.

5. Mr. Horton and Mr. Melton were building adjacent residences on April 21, 2005. Neither Mr. Melton nor his company had any business relationship pertaining to any aspect of the construction of Mr. Horton's home. Mr. Horton was allowed to borrow things, i.e., the scaffold, from Mr. Melton's adjacent property from time to time.

6. "Melton Homes, Inc.," and a building permit number were printed on a sign. It was placed between the homes on Mr. Horton's property. Other than the borrowing of the scaffold and the placement of the sign, there is no indication that Mr. Melton or Melton Homes, Inc., was involved in the construction of Mr. Horton's home. Mr. Melton used different subcontractors in building his home than Mr. Horton did.

7. Claimant mostly used his own equipment and tools. He sometimes used extension cords owned by Gibson. Claimant was unaware of how or through whom Gibson secured the work on Mr. Horton's home. Claimant was paid by Gibson in cash for his hourly work, without withholding or W-2. He anticipated receiving a 1099 form for his work in 2005, but did not. Claimant had some experience as a drywaller. Both Mr. Horton and Gibson were often – but not continuously – on site when Claimant worked. The record does not well describe the extent to which Claimant was instructed in details of his work or was

expected to know and work on his own. Claimant's testimony demonstrated his pride in his own knowledge and ability as a drywaller.

8. Gibson filed an answer in this matter but did not appear at hearing. His answer, admitted at hearing includes the following statements:

"Mitchell [sic] Freeman was helping me hang sheet rock with the express understanding that I carried no workman's comp and he was responsible for all tax's [sic]. Home owner accepted responsibility for this job. Home owner's scaffolding [sic] broke causing accident."

...

"On one specific occasion, a home owner wanted to save money by not having a contractor involved, so asked myself and Mitchell [sic] Freeman to hang his sheet rock. The owner provided the scaffolding which broke, causing the accident. I therefore contend that the home owner and his home owners [sic] insurance are responsible for the medical bills in question for Mitchell [sic] Freeman."

9. Claimant incurred medical expenses including the following:

River City Anesthesia Associates	\$ 530.00
North Idaho Imaging Center	935.00
Ortho Surgery and Sports Medicine	4,515.00
NW Specialty Hospital	<u>5,738.45</u>
Total	\$11,718.45

Claimant anticipates one more surgery to remove surgical screws from his foot.

### **Discussion and Further Findings**

10. **Gibson as Employer.** "Employer" is defined by statute.

"Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. If the employer is secured, it means his surety so far as applicable.

Idaho Code § 72-102(12). "When doubt exists as to whether an individual is an employee or an independent contractor under the worker's compensation laws, the Act must be given a liberal

construction by the Commission in its fact finding function in favor of finding the relationship of employer and employee.” Shriner v. Rausch, 141 Idaho 238, 108 P.3d 375 (2005). This liberality is not required when construing facts from conflicting evidence. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878,880 (1992).

11. “Independent contractor” is also defined by statute.

“‘Independent contractor’ means any person who renders service for a specified recompense for a specified result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished.”

Idaho Code § 72-102(16). Here, Claimant was paid for his hours of work. He did not receive a specified recompense for a specified result.

12. The test to determine whether a worker is an independent contractor or an employee includes four factors: 1) there must be evidence of the employer’s right to control the employee; 2) the method of payment; 3) who furnishes the equipment; 4) whether and under what circumstances either party may terminate the relationship. Shriner, supra.

13. Here, the relationship between Claimant and Gibson began only about six days prior. Moreover, Gibson’s failure to appear at hearing denied the parties the opportunity to cross-examine him. Further, questions arose which may have been answerable by Mr. Horton, but no party called nor subpoenaed him. Thus the evidence is scant. Gibson should not benefit by ignoring the Commission’s Notice of Hearing.

14. Considering the factors of the test: First, Gibson was often, but not always, on site when Claimant worked. Claimant could begin and end his work day at his own discretion. However, from the mere fact that in six days Gibson did not actually exercise control over Claimant’s start and stop times, it does not follow that Gibson did not have the right to control this or other aspects of Claimant’s work. The record is insufficient to determine this first

factor; it is considered neutral, favoring neither party.

15. Second, Claimant was paid for hourly work, not for the result and not by the square foot. Taxes were not withheld by Gibson. Claimant did not receive a 1099 form. Claimant accrued no leave nor other fringe benefits during his relationship with Gibson. Gibson's failure to deliver a 1099 form indicates Gibson did not think of Claimant as an independent contractor. Gibson's decision to pay Claimant by the hour indicates Gibson thought of Claimant as an employee. These indications are not negated by the lack of tax withholding under these circumstances where Gibson has shown disdain for Idaho's laws and the agencies that administer them. The second factor favors finding Claimant an employee of Gibson.

16. Third, Claimant provided all his own tools, except occasionally for extension cords. Claimant also provided his own power tool, namely, a screw gun. He did not provide his own scaffold. The record does not indicate Claimant purchased or provided any materials, i.e., sheetrock or screws. The Referee takes judicial notice that construction industry workers, whether employees or independent contractors, are usually expected to provide their own tool belt and hand tools. With the ownership of the screw gun indicating one way and the scaffold the other, this third factor is considered neutral, favoring neither party.

17. Fourth, there is no direct evidence of any party's right to terminate the relationship. However, before the Horton job, Claimant worked only as an employee for other drywall companies. After Claimant recovered from the accident, he worked only as an employee consecutively for two other employers. Moreover, immediately after the accident, Gibson stated he did not have workers' compensation insurance. That statement is considered an admission by Gibson that he knew he should have it for the accident under consideration. This fourth factor, by indirect inference, favors finding Claimant an employee of Gibson.

18. Claimant did not bid this job. He merely accepted employment for a wage. By statutory definitions and applying the common law test, Claimant was an employee of Gibson.

19. **Melton as Statutory Employer.** Idaho Code § 72-216(1) applies to contractors.

An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

20. The only indications that Defendants had any involvement with the Horton job were that the scaffold was used on the property and a single sign stood between two homes being constructed. Mr. Melton denied any business relationship with Horton beyond purchasing the neighboring property from him. The scaffold was a neighborly loan without remuneration. There is no indication Mr. Melton or Defendants were in the construction equipment rental business. The sign does not constitute or indicate a contract between Defendants and Horton, Defendants and Gibson, or Defendants and Claimant. Additionally, Mr. Melton admitted in discovery he received a telephone call from Gibson on the date of the accident. Without evidence of the substance of the conversation, this constitutes no indication of any relevant business relationship between Gibson and Mr. Melton or Defendants. Moreover, Gibson's answer in this matter makes no mention of Mr. Melton or Defendants having any relevant business relationship whatsoever. From the record, Gibson had business relationships with Mr. Horton and with Claimant only. The only other person mentioned in the record, a witness to the accident named Steve, is of unknown connection.

21. Claimant failed to show he was "an employee of a contractor or subcontractor under [Mr. Melton or Defendants] who has not complied with the provisions of section 72-301 in any case where such employer would have been liable for compensation if such employee

had been working directly for [Mr. Melton or Defendants].” Melton Homes, Inc., was not a statutory employer of Claimant and Defendants are not made liable for Claimant’s claim by application of Idaho Code § 72-216(1).

22. As Mr. Horton was not named a party as a potential statutory employer, his potential liability is not considered nor addressed here. However, the leading cases are perhaps Shriner, supra., Dewey v. Merrill, 124 Idaho 201, 858 P.2d 740 (1993), Lynskey v. Lind, 94 Idaho 788, 498 P.2d 1261 (1972), and Moon v. Ervin, 64 Idaho 464, 133 P.2d 933 (1943).

23. **Medical Care.** Claimant required reasonable medical care in the amount of \$11,781.45 and may require an additional surgery to remove screws in the future. He is entitled to this benefit.

24. **Permanent Impairment and Disability.** Claimant offered no evidence to support his claim for PPI or permanent disability. No physician has opined Claimant suffers any PPI. Claimant has returned to work in the same industry at a wage higher than at the time of accident.

25. **§ 210 Penalty.** Idaho Code § 72-210 provides a claimant “shall be awarded” 10% of compensation, plus costs and reasonable attorney’s fees where an employer failed to secure payment of compensation as required by the Act. Gibson was uninsured. The penalty applies.

### **CONCLUSIONS OF LAW**

1. Claimant suffered a compensable accident and injury while an employee of Gibson and not an independent contractor;

2. Claimant is entitled to medical benefits amounting to \$11,718.45, and future reasonable medical care, which now anticipates removal of surgical screws;



3. Claimant failed to show entitlement to any PPI or PPD;
4. Claimant failed to show Melton Homes, Inc., was a statutory employer for purposes of the subject accident. Melton Homes, Inc., and Surety bear no liability regarding this matter;
5. Claimant is entitled to an additional award of 10% of compensation plus costs and reasonable attorney fees under Idaho Code § 72-210.

### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 14<sup>TH</sup> day of July, 2006.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>TH</sup> day of July, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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/S/ \_\_\_\_\_